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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

Coordination Proceeding Special Title (Rule 3.550) BUTTE FIRE CASES.	CASE NO. JCCP 4853 MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PG&E'S RENEWED MOTION CONCERNING LIABILITY FOR INVERSE CONDEMNATION [C.C.P. §§ 1008(a), 1008(b), & 1260.040] DATE: April 26, 2018 TIME: 10:00 a.m. DEPT: 42 JUDGE: Hon. Allen H. Sumner

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I. INTRODUCTION

PG&E's "Renewed Motion for a Legal Determination of Inverse Condemnation Liability" fails for a number of reasons. ***First***, this Court has no jurisdiction to hear the motion because Public Utilities Code § 1759 vests exclusive jurisdiction to review decisions of the CPUC with the Court of Appeal and the Supreme Court. ***Second***, the only proper procedure in which to review the CPUC's "Decision Denying Application" is through a writ of review as provided in Public Utilities Code § 1756.[1] ***Third***, the issue raised by PG&E is not ripe for adjudication by any court because the CPUC's "Decision Denying Application" as it relates to inverse condemnation is not a decision at all, but only an advisory opinion or an observation based on an undefined hypothetical situation. ***Fourth***, the decision challenged by PG&E is not final and therefore not ripe for adjudication by any court because the parties, including PG&E, to the CPUC proceeding have sought rehearing and must exhaust their administrative remedies before seeking a judicial remedy. ***Fifth***, PG&E has not presented any "new law" or "new facts" and this Court therefore lacks jurisdiction under Code of Civil Procedure § 1008, subds. (b) and (e), to hear PG&E's renewed motion. ***Sixth***, as shown by Plaintiffs' objections to PG&E's evidence and opposition to PG&E's request for judicial notice, the motion is not supported by competent evidence. ***Finally***, there has been no change in the controlling law and this Court is required to follow the cases stating and applying that law under *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455-456.

II. LEGAL ARGUMENT

A. This Court Lacks Jurisdiction to Hear PG&E's Motion

1. PG&E's "Renewed" Motion Asserts that the CPUC Violated State Law, the State Constitution, and the United States Constitution

The foundation of PG&E's "renewed" motion under Code of Civil Procedure § 1008(b) is that the CPUC's "Decision Denying Application" is both constitutionally and legally infirm. In "Pacific Gas & Electric Company's Notice of Motion and Renewed Motion for a Legal Determination of Inverse Condemnation Liability" ("PG&E's Renewed Motion"), pp. 10:6-14:2,

[1] The CPUC's "Decision Denying Application" dated November 29, 2017, is attached as Exhibit G to the Declaration of Jeffrey Boozell and is the subject of PG&E's Request for Judicial Notice ("DRJN").

PG&E devotes an entire section of its brief to attempting to establish the CPUC committed manifold errors under state law, the California Constitution, and the United States Constitution. As PG&E expressly states in its brief, "the PUC's declaration that inverse condemnation is irrelevant to its rate-making process establishes that the application of inverse to private utilities violates the California and U.S. Constitution." (PG&E's Renewed Motion, p. 10:6-8.) The argument is not only illogical, it is undermined by its very premise, i.e., that the CPUC's application of inverse condemnation principles is wrong and that the CPUC must apply it.

2. The Investor Owned Utilities Raised Similar Arguments Before the CPUC

In their respective applications for rehearing before the CPUC, the three major investor owned utilities, San Diego Gas & Electric ("SDG&E"), PG&E, and Southern California Edison ("SCE"), argued that the "Order Denying Application" violated statutory and constitutional law. (See Plaintiffs' Request for Judicial Notice ("PRJN") Exs. 1-2.) Those arguments were refuted in a brief submitted by the Office of Ratepayer Advocates ("ORA"). (PRJN, Ex. 3.)

In SDG&E's Application for Rehearing, it devoted eleven (11) pages to argument relating to inverse condemnation, and thirty-five (35) pages to argument relating to various evidentiary, procedural, and constitutional errors allegedly made by the CPUC in its "Order Denying Application." (See PRJN Ex. 1, pp.11-22 [inverse condemnation] and pp. 22-57 [other errors].)

> "In finding SDG&E imprudent with respect to the operation and management of its facilities prior the Witch, Guejito and Rice Fires, the Commission committed a series of legal errors that, under Public Utilities Code § 1757(a), render the Decision subject to reversal on appeal. The Decision's most egregious legal errors are that its findings are not supported by substantial evidence in light of the whole record, it did not proceed in the manner required by law (particularly with respect to application of the prudent manager standard), and it conflicts with due process standards." (PRJN Ex. 1, SDG&E Request for Rehearing, p. 22.)[2]

PG&E and SCE argued in their combined application for rehearing, "[t]he Commission must implement [the constitutionally based principle of inverse condemnation] in applying the

[2] Plaintiffs are not offering the contents of PRJN, Exs. 1-3, for the truth of any matter stated, but are offering them for the nonhearsay purpose of showing that the statements were made. In addition, Request for Rehearing itself shows that the "Order Denying Application" is not final. These fact are not reasonably subject to dispute and are therefore a proper matters for judicial notice under Evidence Code § 452, subds. (c) and (h).

'just and reasonable' standard of § 451. Thus, the Commission legally erred in concluding that 'Inverse Condemnations principles' were 'not relevant to a Commission reasonableness review' in this case." (PRJN Ex. 2, p. 6.) The entirety of § III.B of PG&E and SCE's combined application for rehearing continues in a similar vein. (PRJN Ex. 2, pp. 6-9.)

3. This Court Lacks Jurisdiction to Rule on the Validity of the "Decision Denying Application"

"'[T]he [C]PUC is not an ordinary administrative agency, but a constitutional body with broad legislative and judicial powers.' [Citation.]" (*New Cingular Wireless PCS, LLC v. Public Utilities Commission* (2016) 246 Cal.App.4th 784, 806.)

This Court has no jurisdiction to conduct a review of the "Decision Denying Application" because that jurisdiction rests exclusively with the Court of Appeal or the Supreme Court. "[P]ursuant to its plenary authority under article XII, section 5 of the state Constitution 'to establish the manner and scope of review of commission action in a court of record,' the Legislature has explicitly restricted the jurisdiction of the superior court in cases involving the CPUC." (in *PegaStaff v. California Public Utilities Commission* (2015) 236 Cal.App.4th 374, 383.)

The *PegaStaff* court further held:

> "The Legislature's provision in [Public Utilities Code §] 1760 for full consideration of constitutional issues in the appellate courts means that a party such as PegaStaff that is aggrieved by a statute it contends is unconstitutional has an adequate remedy. It also supports an interpretation of [Public Utilities Code §] 1759 as ***depriving superior courts of jurisdiction even in constitutional cases involving constitutional issues***. [Emphasis added]."

(*Id.,* at p. 391; see *California Public Utilities Commission v. Superior Court* (2016) 2 Cal.App.5th 1260, 1272 ["[B]y its nature, the broad limitation on jurisdiction in section 1759, subdivision (a) will sometimes result in depriving the superior court of jurisdiction it might otherwise have as a court of general jurisdiction had the party been other than the CPUC. (See Cal. Const., art. VI, § 10.)"; see also, *PG&E Corporation v. Public Utilities Commission* (2004) 118 Cal.App.4th 1174, 1221 ["We acknowledge that a superior court action premised on a violation of a CPUC order poses the peculiar problem that section 1759 precludes the superior court from reviewing the propriety of the CPUC order that forms the basis for the action."].)

Public Utilities Code § 1759(a) provides:

> "No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court."

Public Utilities Code § 1760 sets forth the manner in which the Court of Appeal or Supreme Court would conduct such a review:

> "Notwithstanding Sections 1757 and 1757.1, in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the United States Constitution or the California Constitution, the Supreme Court or court of appeal shall exercise independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."

For these reasons, this Court simply has no subject matter jurisdiction to inquire into the lawfulness of the CPUC's "Order Denying Application." (See *Barnett v. Delta Lines, Inc.* (1982) 137 Cal.App.3d 674, 681 ["The CPUC has exclusive jurisdiction over the regulation and control of utilities, and once it has assumed jurisdiction, it cannot be hampered, interfered with, or second-guessed by a concurrent superior court action addressing the same issue."]; see also *Anchor Lighting v. Southern California Edison Co.* (2006) 142 Cal.App.4th 541, 548.) Any such inquiry must be left to the Court of Appeal and the Supreme Court.

B. PG&E Must Bring a Writ of Review in the Court of Appeal to Challenge a Ruling by the CPUC

Not only has PG&E chosen the wrong court in which to raise issues involving the lawfulness of the CPUC's "Order Denying Application," it has employed the wrong procedure.

Public Utilities Code § 1756(a) provides that the proper vehicle for PG&E to bring the issue before the Court of Appeal or the Supreme Court is through a writ of review:

> "Within 30 days after the commission issues its decision denying the application for a rehearing, or, if the application was granted, then within 30 days after the commission issues its decision on rehearing, or at least 120 days after the application is granted if no decision on rehearing has been issued, any aggrieved party may petition for a writ of review in the court of appeal or the Supreme Court for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. If the writ issues, it shall be made returnable at a time and place specified by court order and shall direct the commission to certify its record in the case to the court within the time specified."

Defendant Pacific Gas & Electric Company, the independently owned utility, is certainly aware of the proper procedure, having itself sought a writ of review in the First District Court of Appeal after the CPUC had imposed fines of $14,350,000 relating to the 2010 San Bruno Gas Explosion. (See *Pacific Gas & Electric Company v. Public Utilities Commission* (2015) 237 Cal.App.4th 812, 837-838.) Similarly, Defendant PG&E Corporation, the holding company, is also aware of the proper procedure. (See *PG&E Corporation, supra,* 118 Cal.App.4th at p. 1192 [challenge by utility holding companies to jurisdiction of the CPUC over them].) Perhaps one or both of the PG&E Defendants will explain their failure to follow the proper procedure.

C. The "Decision Denying Application" Is Not a Decision at All, and Is Only an Advisory Opinion as It Relates to Inverse Condemnation

PG&E would have this Court improperly employ judicial notice of a number of official records to establish the truth of the "fact" that for the "first time" the CPUC found that inverse condemnation is not relevant to its exercise of jurisdiction over recovery/cost allocation issues. (See Plaintiffs' Opposition to Request for Judicial Notice.) However, the "Decision Denying Application" that is the centerpiece of PG&E's motion is not a decision at all. It is at best a kind of administrative advisory opinion or *dictum*.

Proper judicial notice of the documents proffered by PG&E will show that SDG&E sought to pass off some of the costs of settling claims arising from three wildfires in 2007 to rate payers, and the CPUC denied that request based on a finding that SDG&E's operation of its equipment had not been reasonable and prudent. Judicial notice can also be properly taken to show the CPUC discussed the interplay between (i) a ***hypothetical*** determination by a court that a ***hypothetical*** utility was liable for inverse condemnation in an ***unspecified and hypothetical*** factual situation and (ii) the CPUC's jurisdiction over cost recovery/cost allocation issues involving Commission regulated utilities. That is the limit to which judicial notice of the documents will extend.

The Court should note that in PG&E's Renewed Motion, pp. 4:25-5:2, PG&E omitted the rather critical statements of the CPUC that Plaintiffs have emphasized in the following quotation from the "Decision Denying Application":

> "First, Inverse Condemnation principles are not relevant to a Commission reasonableness review under the prudent manager standard. ***Thus, Inverse***

> ***Condemnation was not a material issue in Phase 1 and did not merit a dedicated discussion. Notably, even SDG&E withdrew its testimony concerning Inverse Condemnation for purposes of Phase 1.***
>
> ***"Second, according to SDG&E's application, the Superior Court only went so far as to rule that the plaintiff homeowners could plead Inverse Condemnation claims in their civil actions against SDG&E. We are not aware of any Superior Court determination that SDG&E was in fact strictly liable for the costs requested in its application.*** Even if SDG&E were strictly liable, we see nothing in the cited case law that would supersede this Commission's exclusive jurisdiction over cost recovery/cost allocation issues involving Commission regulated utilities. [Emphasis added.]" (DRJN, Ex. G, p. 65.)

The omission is critical because it is a fact that the trial court in the San Diego wildfire cases ***never*** found SDG&E liable for inverse condemnation, and ***only*** overruled a demurrer to the plaintiffs' cause of action for inverse. (See PRJN Ex. 5; Declaration of Craig S. Simon in Opposition to PG&E's Renewed Motion.) Thus, there was ***never*** a finding of liability by the San Diego Superior Court and there was ***no*** factual record created in either the trial court or in the CPUC proceeding against which the CPUC could truly measure the relationship between a court's finding of liability for inverse condemnation against its own prudent manager standard.

The ripeness element of the doctrine of justiciability is intended to prevent courts from issuing purely advisory opinions. (*Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 170.) It is "primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy." (*Ibid*; see also *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 708 ["Courts will not be drawn into disputes that depend for their immediacy on speculative future events"].)

Both PG&E and SCE are readily-familiar with the principle of ripeness. (See *PG&E Corporation, supra,* 118 Cal.App.4th at pp. 1216-1223 [challenge to CPUC condition applicable to utilities not ripe because CPUC had not yet applied its interpretation to a concrete set of facts]; see also *Davis v. Southern California Edison Co.* (2015) 236 Cal.App.4th 619, 645, fn. 19 [challenge to SCE's interpretation of rules will only become ripe once the CPUC has made a final determination].)

Here, the "Decision Denying Application" itself deals with a vaguely defined hypothetical case where: (1) an unidentified court has found an unidentified privately owned public utility liable for inverse condemnation in what may or may not be a final judgment or a pretrial order or an order granting a writ of review; (2) the unidentified court may or may not have also found that unidentified privately owned public utility liable for other claims such as negligence or some intentional tort in the same case in what may or may not be a final judgment or a pretrial order or an order granting a writ of review; (3) the unidentified court may be a trial court or a court of appeal or the Supreme Court; and (4) the unidentified privately owned utility has sought authority from the CPUC to pass on unidentified costs to ratepayers based on unidentified reasons.

PG&E has not shown that it ever sought authority from the CPUC to recover costs for the Butte Fire. PG&E has not shown that it ever sought approval from the CPUC to recover any settlement amounts. PG&E has not shown that the CPUC has actually applied the "Decision Denying Application" to any utility.[3]

Based on the record before this Court, the CPUC has not applied its interpretation of the relationship of liability under inverse condemnation to a concrete set of facts and any review of that interpretation would necessarily depend on speculative future facts. Such as it is, that interpretation is not ripe for review by any court.

D. The "Decision Denying Application" Is Not a Final Decision and Is Not Ripe for Review by Any Court

The "Decision Denying Application" that is at the heart of PG&E's current motions in this Court is not ripe for review for second reason – it is not a final decision. When properly limited, the parties' requests for judicial notice show that: (1) SDG&E, PG&E, and SCE have filed applications for rehearing of the "Decision Denying Application"; (2) the CPUC has not ruled on those application; and (3) SDG&E, PG&E, and SCE have threatened to appeal any adverse ruling by the CPUC to the proper court. (See Plaintiffs' Opposition to Request for Judicial Notice.)

[3] Plaintiffs respectfully decline to speculate as to the outcome of this hypothetical exercise but would only note that approval for such a recovery would be highly doubtful given the CPUC's imposition of an $8.3 million sanction against PG&E for "failing to maintain its 12 kV overhead conductors safely and properly" and for failing to maintain a minimum distance between the power lines and the tree.

Further, as set forth above in § II.A.2, the proper court for such review is either the court of appeal or Supreme Court because this Court lacks jurisdiction to conduct any such review.

Public Utilities Code § 1731(b) provides in part:

> "After an order or decision has been made by the commission, a party to the action or proceeding, or a stockholder, bondholder, or other party pecuniarily interested in the public utility affected may apply for a rehearing in respect to matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. A cause of action arising out of any order or decision of the commission shall not accrue in any court to any corporation or person unless the corporation or person has filed an application to the commission for a rehearing within 30 days after the date of issuance …."

On January 2, 2018, SDG&E filed an application for rehearing of the November 30, 2017, "Decision Denying Application." (PRJN, Ex. 1.) On January 2, 2018, PG&E and Southern California Edison jointly filed an application for rehearing.[4] On January 17, 2018, the ORA filed a cogent response to the applications for rehearing, arguing that the CPUC correctly determined that inverse condemnation is not relevant to its application of Public Utilities Code § 451, and that the denial of cost recovery is supported by the record. (PRJN, Ex. 3.)

Whether or not SDG&E, PG&E, or SCE seeks appellate review, the decision of the CPUC is not "final" because the CPUC has not issued a ruling on the application for rehearing. (*City of Los Angeles v. Public Utilities Commission* (1975) 15 Cal.3d 680, 707; *Communications Telesystems Int'l v. California Public Utilities Commission*, 196 F.3d 1011, 1016 (9th Cir. 1999) ["According to California law, the 'final' administrative decision is the one made on an application for rehearing, not the original decision."].)

Even assuming that this Court has jurisdiction to review the "Decision Denying Application," that decision is not final, and the matter is simply not "ripe" for review by any court. Where there are concurrent judicial and administrative proceedings, the ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a

[4] PG&E and Southern California Edison were granted limited party status in SDG&E's application by the CPUC. (See DRJN, Exs. E and F.)

concrete way by the challenging parties." (*Pacific Legal Foundation, supra,* 33 Cal.3d at p. 171; see *PegaStaff, supra*, 236 Cal.App.4th at 388 ["The general rule is that a plaintiff must first exhaust administrative remedies before seeking a judicial remedy. [Citation.]"; see also *Davis, supra,* 236 Cal.App.4th at p. 645, fn. 19; *PG&E Corporation, supra,* 118 Cal.App.4th at p. 1217; *Schell v. Southern California Edison Co.* (1988) 204 Cal.App.3d 1039, 1047.)

For these reasons, the ripeness doctrine forecloses this Court's review of the "Decision Denying Application" because it is not a final decision.

E. The "Decision Denying Application" Is Not "New Law" or a "New Fact"

This Court lacks jurisdiction to consider PG&E's renewed motion for an additional reason, namely that the motion is not based on "new law" or "new facts."

PG&E's renewed motion is based on Code of Civil Procedure § 1008(b):

> "A party who originally made an application for an order which was refused in whole or part, or granted conditionally or on terms, may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. For a failure to comply with this subdivision, any order made on a subsequent application may be revoked or set aside on ex parte motion."

As provided in Code of Civil Procedure § 1008(e), these requirements are jurisdictional:

> "This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final."

PG&E argues that the CPUC's observations about the interplay between inverse condemnation and the CPUC's prudent manager standard are either "new facts" or "new law." However, those observations are based on well-established law and agency procedure and are not "new" in any sense of the word.

It is undisputed by PG&E that a finding of liability for inverse condemnation does not require a finding of foreseeability or fault. Under Article I, section 19 of the California Constitution, a public entity may be liable in an inverse condemnation action for "any physical injury to real property proximately caused by the improvement as deliberately designed and

constructed … whether foreseeable or not." (*Albers vs. County of Los Angeles* (1965) 62 Cal.2d 250, 263-264; *Barham v. Southern California Edison Co.* (1999) 74 Cal.App.4th 744, 751; see also *Souza v. Silver Development Co.* (1985) 164 Cal.App.3d 165, 170; *CSAA v. City of Palo Alto* (2006) 138 Cal.App.4th 474; *Pacific Bell v. Southern California Edison Co.* (2012) 208 Cal.App.4th 1400, 1406-1408.)

According to the record below, it is also undisputed that PG&E is an electrical corporation with the power of condemnation and a public utility regulated by the California Public Utilities Commission. More importantly, it is undisputed that PG&E supplied electrical power in this area for a **public use**. Under the cases cited above, there is no rational reason to distinguish between a publicly owned utility and an investor owned utility for the purposes of imposing inverse condemnation liability against PG&E. Contrary to the suggestions of PG&E, inverse condemnation liability is not intended to, nor would it apply to every case in which PG&E equipment is involved. In other words, inverse condemnation is not synonymous with "absolute liability." For public policy reasons, the courts are empowered to apply the constitutional remedy and find liability without fault. However, liability is restricted to instances in which there is a failure of a public improvement as deliberately designed and constructed. The *Albers* Court fully recognized the fears that an open-ended, absolute liability rule of inverse condemnation could inhibit the construction of beneficial public improvements: "Thus we limited our holding of inverse condemnation, *absent fault*, to 'physical injuries of real property' that were 'proximately caused' by the *improvement as deliberately constructed and planned*. [Emphasis added.]" (*Belair v. Riverside County Flood Control District* (1998) 47 Cal.3d 550, 558; *Albers, supra*, 62 Cal.2d at 263-264. This requirement is satisfied by any of the following: (1) PG&E's decision to execute a deferred vegetation management maintenance program; (2) PG&E's acceptance of a vegetation management plan that allowed for risks that not all trees would be in compliance; or (3) PG&E's acceptance of a vegetation management plan that allowed for a large number of noncompliant trees which would fall on or lean towards its lines and cause fires.

The CPUC's authority to fix rates is set by the California Constitution, art. XII, § 6, that provides: "The commission may fix rates, establish rules, examine records, issue subpoenas,

administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction."

The CPUC's process of establishing rate amounts is set by statute. Public Utilities Code § 451 that provides in part: "All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful." Public Utilities Code § 454 provides in part: "a public utility shall not change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified."

Well-established agency practice requires that a utility demonstrate to the CPUC that its actions were both reasonable and prudent in order to recover costs through a rate adjustment. "A utility may recover all costs which the commission determines to be reasonable and prudent by adjusting rates paid by its customers. If the commission determines that any costs were not reasonably incurred, it orders the utility to make an adjustment to reduce rates prospectively or make a refund to its ratepayers." (*Southern California Gas Co. v. Public Utilities Commission* (1990) 50 Cal.3d 31, 36, fn. 3.)

It is unfathomable how PG&E could to fail to grasp that a finding of inverse liability under Code of Civil Procedure § 1260.040 that **does not** require a finding of fault or unreasonable behavior would have no effect on or would not be relevant to a determination of whether rates should be adjusted where that determination **does** require such a finding. Whether PG&E's misapprehension is feigned or real, the "new law" that it professes to perceive is not new at all, nor is the CPUC's *dictum* in the "Decision Denying Application" a "new fact."

PG&E's misapprehension is feigned and not real. PG&E has been involved in rate cases prior to the 2017 "Decision Denying Application" at issue here in which the CPUC articulated the procedure it follows and the burden it imposes in rate cases. For example, in a 2011 decision arising out of the 2010 San Bruno Gas Explosion, the CPUC imposed obligations on PG&E intended to move PG&E "towards becoming a safe natural gas transmission system operator."

(PRJN, Ex. 6, p. 2.) The decision allocated the additional costs PG&E would incur between ratepayers and shareholder. (PRJN, Ex. 6, pp. 2-4.) The decision also articulated the procedure followed by the CPUC and the burden it imposes on utilities in rate cases:

> "Pursuant to Pub. Util. Code § 451 all rates and charges collected by a public utility must be 'just and reasonable,' and a public utility may not change any rate 'except upon a showing before the commission and a finding by the commission that the new rate is justified.' (§ 454.) The Commission requires that the public utility demonstrate with admissible evidence that the costs which it seeks to include in revenue requirement are reasonable and prudent. The Commission is charged with the responsibility of ensuring that all rates demanded or received by a public utility are just and reasonable.
>
> "PG&E must meet the burden of proving that it is entitled to the relief sought in this proceeding, and PG&E has the burden of affirmatively establishing the reasonableness of all aspects of the application.
>
> "With the burden of proof placed on PG&E, the Commission has held that the standard of proof PG&E must meet is that of a preponderance of evidence. Preponderance of the evidence usually is defined 'in terms of probability of truth, e.g., "such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth."' In short, PG&E must present more evidence that supports the requested result than would support an alternative outcome." (PRJN, Ex. 6, pp. 41-42.)

In a precursor to the November 2017 "Decision Denying Application," SDG&E, PG&E, Southern California Edison Company (Edison), and Southern California Gas Company (SoCal Gas), filed an application in 2009 requesting CPUC authorization to establish a balancing account to allow each utility to recover from ratepayers "all amounts paid by the utility arising from wildfires."[5] (PRJN, Ex. 4, p. 2.) SDG&E and SoCalGas "ask[ed] the Commission to allow them to recover wildfire costs in rates on the grounds that wildfire risk come with their obligation to serve, recovery of such costs is consistent with Commission treatment of the costs created by natural disasters, and the doctrine of inverse condemnation presupposes that costs allocated to the public entity will be shared by all users served by that entity. The applicants also argue[d] that

[5] Balancing accounts are approved by the CPUC and are established by utilities to serve various ratemaking purposes. The primary purpose of balancing accounts is to ensure that a utility recovers its CPUC authorized revenue requirement from ratepayers for a given program or function, but no more or less. Since rates are always forward-looking and based on forecasted sales, actual collections by the utility from ratepayers can be more or less than what the Commission had authorized it to collect. The net balance in a balancing account is typically recovered from or refunded to ratepayers on an annual basis, but in some cases, the amortization of the balance may be more frequent.

certainty of rate recovery for wildfire costs is necessary for utilities to maintain their financial strength." (PRJN, Ex. 4, p. 7.) That application was denied in the CPUC's 2012 "Decision Denying Application." (PRJN, Ex. 4, p. 7.)

In other words, the key issues raised by PG&E, SDG&E, and SCE in their applications leading to the 2017 "Decision Denying Application" and in their present requests for rehearing were raised, discussed, and determined in the 2012 "Decision Denying Application." (PRJN, Ex. 4). Issues of inverse condemnation, fire safety, and the potential exposure of ratepayers to unlimited costs were all part of the evidentiary record. (PRJN, Ex. 4, pp. 7, 11-12, and 16.)

In denying the application, the CPUC found that the applicants' proposed use of balancing accounts to pass through all costs associated with wildfires unfairly "continues to provide for unlimited potential for uninsured wildfire costs [being passed on] to ratepayers" and that it "does not create incentives to reduce the risk of wildfires." (PRJN Ex. 4, p. 18.)

Is a determination that liability for inverse condemnation does not include a finding of fault a "new law"? Is it a "new fact"? If the CPUC does not approve an automatic pass-through of all wildfire costs, does that constitute "new law"? Is it a "new fact"? If the CPUC requires a utility to prove that its actions were "reasonable" and "prudent" before approving a rate change, does that constitute "new law"? Is it a "new fact"? The answer to these questions is a simple "no."

Is PG&E aware that there no "new facts" and no "new law"? The answer is a simple "yes" which makes their attempt at reconsideration even more inappropriate.

F. The Doctrine of *Stare Decisis* Compels this Court to Follow *Barham*

At the hearing on March 15, 2018, this Court raised the concern that the "landscape" may have changed such that prior appellate decisions are no longer directly controlling but are merely guiding. Plaintiffs strongly contend that there has been no change in the law that has been recognized by a Court of Appeal or the Supreme Court that abrogates, modifies, or in any way disapproves of *Barham, supra,* 74 Cal.App.4th 744, *Souza, supra,* 164 Cal.App.3d 165, *CSAA, supra,* 138 Cal.App.4th 474, or *Pacific Bell, supra,* 208 Cal.App.4th 1400.

It is also significant that *Barham, supra,* 74 Cal.App.4th at p. 753, strongly relies on the California Supreme Court decision in *Gay Law Students Association v. Pacific Tel. & Tel. Co.*

(1979) 24 Cal.3d 458, 469-470, which holds that privately owned public utilities that are publicly regulated by the CPUC are the functional equivalent of public agencies or state actors who supply electrical power for a public use and, therefore, there should be no distinction between truly public utilities and privately held, publicly regulated utilities. As further explained by the court in *Pacific Bell, supra,* 208 Cal.App.4th at p. 1406, investor-owned utilities that are regulated by the CPUC enjoy a monopoly or quasi-monopoly on the delivery of electrical power in California. The economic benefit of a state sanctioned monopoly (ie., the elimination of competitors) is derived directly from an exclusive franchise provided by the CPUC which guarantees and safeguards PG&E's monopoly and thereby justifies the imposition of inverse condemnation liability on an Investor Owned Utility such as PG&E. (See *Gay Law Students, supra*, 24 Cal.3d at p. 471).

The doctrine of *stare decisis* compels this Court to follow those decisions.

> "Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court. [Citations.]" (*Auto Equity Sales, supra*, 57 Cal. 2d 450 at 455-456.)

Unless and until a higher court modifies the existing law, this Court must accept and follow the law declared in *Barham, Souza, CSAA,* and *Pacific Bell.*

G. The Court Should Not Accept PG&E's "Invitation" to Reconsider the Order Finding PG&E Liable for Inverse Condemnation

Acknowledging that the jurisdictional 10-day limitation of Code of Civil Procedure § 1008(a) has long passed, PG&E "invites" the Court to reconsider the order granting Plaintiffs' motion under Code of Civil Procedure § 1260.040 to find PG&E liable for inverse condemnation. The Court should decline the invitation for the same reasons it should deny PG&E's renewed motion under Code of Civil Procedure § 1008(b).

III. CONCLUSION

The instant motion carries more than a hint of PG&E speaking out of both sides of its mouth. On the one hand, PG&E argues to this Court that if it follows the CPUC's 2017 "Decision Denying Application," it cannot find PG&E liable for inverse condemnation. On the other hand, PG&E argues to the CPUC that its "Decision Denying Application" violates PG&E's legal and constitutional rights, and the CPUC should abandon its constitutionally and statutorily established standards and processes and allow "guaranteed" rate increases even in situations where PG&E is at fault for causing harm. In essence, PG&E is demanding that the courts maintain the utilities' monopolistic hold on electrical power while at the same time, remove or relax regulations that control price increases and assure the safety of its rate payers. How can this be fair?

PG&E electric distribution lines created a wildfire risk in the foothills when they were installed. Where those lines cause a wildfire and damage private property, the owners of such property, if they are not compensated, would contribute more than their fair share to a public project which benefits the public at large. For this reason, just compensation rises to the level of a constitutional right and is mandated in this case. Nothing in the 2017 "Decision Denying Application" prevents PG&E from spreading the costs of wildfires to its ratepayers where it shows the CPUC that it acted as a reasonable and prudent manager.

PG&E now seeks to change the law so that instead of the risk wildfires being borne by PG&E where it acted in an unreasonable and imprudent manner, all such risk would be borne by the innocent, underinsured, and uninsured fire victims as well as other ratepayers throughout PG&E's territory. That would be a true and ill-considered change in the law.

For all of the foregoing reasons, Plaintiffs respectfully request that the Court deny PG&E's renewed motion.

Dated: March 29, 2018

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